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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

CRAIG McCARTHY,
PLAINTIFF-PETITIONER,
v.
THE BARK PEKING, HER SAILS, EQUIPMENT, APPURTENANCES, ETC., AND SOUTH STREET SEAPORT MUSEUM,
DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS,
v.
THE STATE INSURANCE FUND AND NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
THIRD-PARTY DEFENDANTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Question Presented.

Did the courts below err in holding that a ship repairman, painting the mast of a four-masted bark, afloat and in use as a museum ship, was not engaged in maritime employment within the meaning of the Longshoremen's and Harbor Worker's Compensation Act, 3 U.S.C. §§ 901 *et seq.*?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Introduction.

The plaintiff in this case was injured while painting the upper mainmast of the defendant vessel, a four-masted ship afloat on the waters of New York Harbor and put to use by the other defendant as a museum. At a point 120 feet above the deck, the gantline holding the plaintiff's bosun's chair aloft parted and he fell sixty feet to smash across a stay. Affirming summary judg-

ment for the defendants, the court below held that the plaintiff was not entitled to sue the ship and its owner under § 5(b) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), because he was not, in that court's view, "engaged in maritime employment" within the meaning of § 2(3) of the Act, 33 U.S.C. § 902(3).

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, *infra*, pp. 1a-9a) is reported at 676 F.2d 42 (1982). The opinion of the United States District Court for the Southern District of New York (Appendix B, *infra*, pp. 10a-14a) appears not to have been reported.

Jurisdiction.

The opinion of the court of appeals is dated April 12, 1982, and was entered on the same date. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1245 (1).

Statutory Provisions Involved.

The pertinent statutes are 1 U.S.C. § 3 and 33 U.S.C. §§ 902 (3), (21), 905(b). They are set forth in Appendix C, *infra*, pp. 15a-16a.

Statement.

1. *The Ship.*

The ship on which the plaintiff was injured, the *Peking*, is a large sailing vessel, weighing 2,883 net tons. Its length is 377 feet overall, and it was launched in 1911 at Hamburg, Germany. She sailed first in the nitrate trade between Europe and South America and then, in the 1930's, became a school ship, moored on the Medway in the United Kingdom. One of her voyages became the basis for a minor maritime classic, *The Peking Battles Cape Horn*, by Irving Johnson (New York, 1st ed. 1931, 2d ed. 1977).

The defendant South Street Seaport Museum acquired the *Peking* in 1974 from a benefactor who contemplated requiring the "usual ship mortgage." The museum, founded in 1967, represents as its "chartered mission" a desire "to promote a major maritime museum, to restore historical architecture and ships, and to revive the economics of the historic Seaport area." It maintains several piers at the foot of Burling Slip in lower Manhattan, and there it moors a number of historical vessels of its own, including the *Pioneer*, a schooner certified for short passenger voyages. South Street Seaport also provides moorings for visiting yachts and ships — most notably the Coast Guard's three-masted bark, the *Eagle*.

When acquired by the museum, the *Peking* made a stormy passage across the Atlantic under the tow of a Dutch ocean-going tug. The voyage was arranged and supervised by a retired Coast Guard commander, a former skipper of the *Eagle*. After repairs at a shipyard on Staten Island, the *Peking* was towed across the harbor to the museum's piers in time for the bicentennial "Tall Ships" celebration in July, 1976. She has been moored there since, shifting on occasion from pier to pier.

As one might expect, and as is consistent with the museum's self-appointed task of restoring ships, the *Peking* remains a

large and complex piece of machinery designed and maintained to float and move about on navigable waters. As the museum's president admits, she is capable of being towed around the harbor or out to sea. Her rudder is locked but her hull is, of course, intact, and her masts, spars, and rigging are aloft. The *Peking* has the other customary components of a sea-going ship, including decks, 'tween decks, compartments, accommodation ladders, and a bosun's locker — albeit a leaky and wet one. In 1980, after the events in issue here, she was put in the charge of a licensed merchant marine officer, referred to by the museum's vice-president as her "shipmaster," to supervise her repair and to make her safe.

2. *The Plaintiff's Fall Down Her Mast.*

In December, 1979, the plaintiff, Craig McCarthy, was employed by South Street Seaport, as he had been since 1976, and was then assigned the tasks of going aloft and painting the *Peking's* tophamper, or upper masts and spars. On December 12, Mr. McCarthy went aloft the ship's mainmast taking his paint bucket and brush. He climbed the ratlines to the "top," a platform a third of the way up the mast. Thence, he hoisted himself further aloft by sitting in a bosun's chair and hauling on the end of an attached block and tackle which was itself held up by a gantline secured to the deck and rigged through a block at the masthead, or highest point of the mast.

The gantline had been supplied from the *Peking's* bosun's locker, just as would have been the case, according to an experienced chief bosun's mate, whether the *Peking* had been "at sea, in a foreign harbor, or in New York as part of a voyage."

Mr. McCarthy did not know it at the time, but that gantline — a length of one-inch manila rope by which his life was suspended — had been donated to the museum the preceding summer by the bosun of the U.S. Coast Guard ship, *Eagle*.

The museum's waterfront director, who accepted the donation, knew the line was unfit for use aboard the *Eagle*. He was warned by a local rope merchant not to use it aboard the *Peking*. He stowed the line in the ship's bosun's locker, where moisture from the leaky overhead could cause its further deterioration. In October, 1979, the waterfront director instructed a co-worker of Mr. McCarthy to use this line to rig the bosun's chairs for the painting project. Neither the co-worker nor Mr. McCarthy knew anything about inspecting manila rope for safety.

When Mr. McCarthy, on December 12, had reached a point roughly 120 feet above the deck of the *Peking*, the gantline parted. Mr. McCarthy fell sixty feet and smashed across a stay — a length of wire rope extending aft and up from the mainmast to the mizzen topmast. He was able to grasp the stay, climb down to the "top," and from there to the deck below. At a hospital that evening he underwent an exploratory laparotomy, abdominal surgery in which a third of his large intestine was found so damaged it had to be removed.

Existence of Jurisdiction Below.

The plaintiff brought this action in admiralty pursuant to the provision of 28 U.S.C. § 1333(1). It is unquestioned that, at the time he was injured aboard the *Peking*, the ship was afloat on the navigable waters of the United States.

Reasons for Granting the Writ.

First, the decision below is at odds with the language and intent of the applicable federal statute. The extent of the cov-

erage of the Longshoremen's and Harbor Worker's Compensation Act is the central issue here because the plaintiff brings this action pursuant to § 5(b) of the Act as amended in 1972, 33 U.S.C. § 905(b). That section allows a ship repairman who is injured by the negligence of a vessel to sue the vessel — even though the vessel may have been his employer — so long as his injury is not caused by the negligence of a fellow ship repairman and so long as negligence, not unseaworthiness, was the cause of the injury. This exception to the normal worker's compensation bar against an employee suing his employer is based on this Court's decision in *Reed* v. *The Yaka*, 373 U.S. 410 (1963), which held in effect that a longshoreman or harbor worker employed directly by a vessel should have the same right to sue the vessel as have longshoremen and harbor workers employed by stevedores and other independent firms.

Under § 2(3) of the Act, 33 U.S.C. § 902(3), the coverage of the Act extends to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and *any harborworker including a ship repairman, shipbuilder, and shipbreaker*, but [not to] a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (Emphasis added.) The term "maritime employment" is not otherwise defined by the Act, but Congress' inclusion within it of the work done by shipbreakers as well as by ship repairmen ought to be dispositive here. Mr. McCarthy, repairing the *Peking* by painting its tophamper and thereby preventing it from becoming a floating hazard, engaged in no less a maritime task than workmen who will someday, when the vessel is placed in drydock, dismantle the very same masts and spars.

As one commentator, critical of the court of appeals' decision, has succinctly pointed out, "Mr. McCarthy was not a

house painter." Paul S. Edelman, "Old Sailing Ships Never Die But Don't Sail Away, Either," *New York Law Journal*, May 7, 1982, p. 1, col. 1.

The court of appeals was of the view that the coverage of the Act ends when a ship ceases to be a part of active navigation and commerce, but the Act itself contains no such limitation, excluding only work done on small ships of less than eighteen net tons, and the court of appeals' position is inconsistent with the applicable statutory definition of "vessel," in 1 U.S.C. § 3, which provides that the term includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

This statute has never been limited only to vessels in active navigation. Indeed, in the *C.H. Northam*, 181 Fed. 983 (D. Mass. 1909), for purposes of limitation of liability, a hulk already in the process of being broken up was held to be a vessel. In *Pleason* v. *Gulfport Shipping Corp.*, 221 F.2d 621 (5th Cir. 1955), another hulk, powerless and with its steering mechanism removed, was held to be a vessel subject to a maritime lien. Most strikingly, in the only other reported case involving a museum ship, *Luna* v. *Star of India*, 356 F. Supp. 59 (S.D. Cal. 1973), in establishing admiralty jurisdiction in a general negligence case, the court held that the term "vessel" encompasses a ship maintained in precisely the same circumstances as those of the *Peking* — as a public museum which had not been in active commercial navigation for decades.

Second, the decision below is far more restrictive in its definition of "maritime employment" than the decisions of other courts of appeals applying the Act.[1] These decisions include

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[1] The decision may well also be at odds with the views of this Court, depending upon the determination of *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 8-1897, in which certiorari was granted on February 22, 1982, but which has not yet been argued or decided. That case also involves the Second Circuit's views on the extent of the Act's coverage.

Mississippi Coast Marine v. *Bosarge*, 637 F.2d 994 (5th Cir. 1981), holding that a carpenter repairing a small yacht in a boatyard was engaged in maritime employment; so also was it held to be maritime employment in *Howard* v. *Rebel Well Service*, 632 F.2d 1348 (5th Cir. 1980), as to a sandcaster working on a tank removed from a drilling barge; *Boudloche* v. *Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), a truck driver lifting a small boat out of navigable waters; and *Duncanson-Harrelson Co.* v. *Director, Etc.*, 644 F.2d 827 (9th Cir. 1981), a workman exposed "to many of the 'perils of the sea' associated with traditional maritime activity" while constructing a mooring post.

While it is true that Mr. McCarthy's employer is, in general, a museum — albeit one which operates piers and passenger cruises, hires shipmasters, and purports to restore ships, it is also true that the activity in which Mr. McCarthy was engaged at the time he was injured was of a traditional maritime nature. He was not injured by a collapsing museum exhibit, nor by an object thrown by an unruly museum patron, nor by any other such occurrence as might happen in the world of curators and display cabinets. He was instead injured when he was performing routine shipboard maintenance and repair work aloft in the tophamper of a ship and when the gantline holding his bosun's chair parted. It parted because it had not been maintained or inspected in accordance with standards necessary aboard ship.

This case represents the harshest limitation yet placed by the Court of Appeals for the Second Circuit upon the coverage of the Longshoremen's and Harbor Worker's Compensation Act. The case on which the court below primarily relied, *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (2nd Cir. 1980), had to do with construction workers injured while building a sewage disposal plant over the Hudson River. Mr. McCarthy was not a construction worker, no more than he was a house

painter. He was a ship repairman, and this petition for a writ of certiorari presents the question whether the Act should be applied, as its language commands, to "any harborworker including a ship repairman."

Conclusion.

The Court should review this case because it presents a significant question concerning the coverage of the Longshoremen's and Harbor Worker's Compensation Act. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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